

POLICY AND PROCEDURE FOR EVALUATING FIRMS APPLYING FOR SWAM CERTIFICATION

INTRODUCTION

The purpose of this procedure is to provide guidance in the certification of firms seeking to participate in the SWAM Program established in part by Executive Order 029, in accordance with the memorandum on SWAM Procurement, dated July 30, 2004, from the Governor's Chief of Staff, SB 598 adopted by the 2004 General Assembly and Code of Virginia, § 2.2-4310B.

I. POLICY

The policy that follow describe the criteria that will be used to determine whether the firm qualify to participate in the SWAM Program.

A. The primary purpose of the **SBE certification** process is to determine if the applicant firm meets the following requirements:

- ✓ to determine if firm is independently owned and operated, and together with affiliates, has **250 or fewer employees**, or average gross receipts of **\$10 million or less** averaged over the previous three years.

The primary purpose of the **WBE/MBE certification** process is to determine if the applicant firm meets the following requirements:

- ✓ to determine if **ownership** is by **protected class individuals** (minorities and women);
- ✓ to determine **investment** by ownership;
- ✓ to determine firm is free from any **conversion rights**;
- ✓ to determine the **operational and managerial control** of the firm; and
- ✓ to determine if the firm is **legally owned, licensed and WBE/MBE** applicant has basic expertise.
- ✓ to determine if the WBE/MBE appears to possess the **requisite knowledge, experience and expertise**.

1. Ownership

To be an eligible WBE/MBE, a firm must be at least 51% owned by WBE/MBE individuals.

In the case of a corporation, such individuals must own at least 51% of each class of voting stock outstanding and 51% of the aggregate stock outstanding.

In the case of a partnership, 51% of each class of partnership interest must be owned by WBE/MBE individuals. Such ownership must be reflected in the firm's partnership agreement.

In the case of a limited liability company, at least 51% of each class of member interest must be owned by WBE/MBE individuals.

2. Control

- (a) Only an independent business may be certified as a WBE/MBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
- (b) A WBE/MBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the WBE/MBE owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-WBE/MBE partners, conditions precedent or subsequent, executory agreements, voting trusts, conversion rights, restrictions on or assignments of voting rights) that prevent the WBE/MBE owners, without the cooperation or vote of any non-WBE/MBE individual, from making any business decision of the firm.
- (c) The WBE/MBE owners must possess the authority and power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
- (d) The WBE/MBE owner must hold the highest officer position in the company (e.g. chief executive officer or president).
- (e) In a corporation, WBE/MBE owners must control the board of directors.
- (f) In a partnership, one of more WBE/MBE owners must serve as general partner, with control over all partnership decisions.
- (g) Individuals who are not WBE/MBE may be involved in a WBE/MBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the

power to control the firm, or be disproportionately responsible for the operation of the firm.

- (h) The WBE/MBE owners of the firm may delegate various areas of management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are WBE/MBE individuals. Such delegation of authority must be revocable, and the WBE/MBE owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the WBE/MBE owners actually exercise control over the firm's operations, management and policy.
- (i) The WBE/MBE owners must have an overall understanding of; the firm's operations and clearly possess managerial and technical competence and experience directly related to the type of business in which the firm is engaged. The WBE/MBE owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The WBE/MBE owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- (j) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the WBE/MBE persons who own and control a potential WBE/MBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, certification should not be denied solely on the ground that the person lacks the license or credential. However, one may take into account the absence of the license or credential as one factor in determining whether the WBE/MBE owners actually control the firm.
- (k) In order to be viewed as controlling a firm, a WBE/MBE owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as

controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time that it is operating.

- (l) A WBE/MBE individual may control a WBE/MBE firm even though one or more of the individual's immediate family members (who themselves are not WBE/MBE individuals) participate in the firm as a manager, employee, owner, or in another capacity. However, the WBE/MBE individual must overwhelmingly be the historical and current dominant or controlling managerial and technical employee.
- (m) Where a firm was formerly owned and/or controlled by a non-WBE/MBE individual (whether or not an immediate family member), ownership and/or control were transferred to a WBE/MBE individual, and the non-WBE/MBE individual remains involved with the firm in any capacity, the WBE/MBE individual now owning the firm must demonstrate, by clear and convincing evidence, that
 - a. the transfer of ownership and/or control to the WBE/MBE individual was made for reasons other than obtaining certification as a WBE/MBE ; and
 - b. the WBE/MBE individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-WBE/MBE individual who formerly owned and/or controlled the firm.
- (n) In determining whether a firm is controlled by WBE/MBE owners, you may consider whether the firm owns equipment necessary to perform its work.
- (o) The VDMBE should grant certification to a firm only for specific types of work in which the WBE/MBE owners have the ability to control the firm.
- (p) A business operating under a franchise or license agreement may be certified if it meets the certification standards and the franchiser or licensor is not affiliated with the franchisee or licensee.
- (q) In order for a partnership to be controlled by WBE/MBE individuals, any non-WBE/MBE partners must not have the power, without the specific written concurrence of the WBE/MBE partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

- (r) The WBE/MBE individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the WBE/MBE individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

B. Other Rules Affecting Certification

1. VDMBE should give consideration to whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the WBE/MBE program.
2. A firm's evaluation must be based on present and historical circumstances. A firm should not be refused certification based solely on historical information indicating a lack of ownership or control of the firm by WBE/MBE individuals at some time in the distant past, if the firm currently meets the ownership and control standards. Nor must a firm be refused certification based solely on it being a newly formed firm.
3. WBE/MBE firms and firms seeking WBE/MBE certification shall cooperate fully with VDMBE's request for information relevant to the certification process. Failure or refusal to provide such information is a ground for administratively closing, denial or removal of certification.
4. Only firms organized for profit may be eligible WBE/MBEs. Not-for-profit organizations, even though controlled by WBE/MBE individuals, are not eligible to be certified as WBE/MBEs.
5. An eligible WBE/MBE firm must be owned by individuals who are WBE/MBE. Except as stated here, a firm that is not owned by such individuals, but instead is owned by another firm – even by a WBE/MBE firm – cannot be an eligible WBE/MBE, except as defined in 6 and 7 below.
6. If WBE/MBE individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the subsidiary may be certified if it meets all the requirements.
7. A subsidiary may be certified only if there is cumulatively 51 percent ownership of the subsidiary by WBE/MBE individuals.

8. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by WBE/MBE individuals.
9. A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification.

C. Other Requirements

- a. **An on-site visit may be performed on all in-state firms prior to certification with periodic follow-up visits, if necessary.**
- b. “Home State” certification may be required for out of state firms before applications are processed. A copy of your firm’s on-site report will be obtained from your home state-certifying agency.
- c. Certified firms seeking re-certification and continual participation will be required to submit the Re-certification form.
- d. No denied firm, it’s owners or officers, affiliates of the denied firm, officers or owners of an affiliated firm will be eligible for certification until one year after the denial and appeal process has ended.
- e. A firm may withdraw its application before issuance of a denial letter and may reapply at any time. After issuance of a denial letter, if a firm withdraws its application, the firm will be required to wait one year from the date of the denial letter to reapply for WBE/MBE certification.

II. The procedures that follow describe the process that will be used to determine whether the above criteria are met.

D. Application

The firm seeking certification must complete and have notarized an **appropriate Certification Application**. The application and all attachments, or a written explanation of their absence, must be submitted before a determination of eligibility can be made.

E. File Preparation

A file will be established for each application received and the information contained on the application will be logged into an MS Access database after performing items 1 and 2.

- a. Checking database for duplication
- b. Assigning of a certification number

Acknowledgement (letter, fax, email, etc.) should be sent within seven (7) days of receipt of the application package to the applicant firm and if additional information is needed it should be requested at that time. (The acknowledgement receipt activity may be waived under special circumstances by the Director or his/her designee.)

F. Initial File Review

The file will be reviewed to ensure the following:

- (1) All portions of the application have been completed or marked n/a.
- (2) The application is appropriately signed and notarized. The notarization should not be by an owner, stockholder or family member of the firm's owner(s).
- (3) All required documentation has been submitted.

Applications will be reviewed in the order of their receipt once all required information is submitted.

If the application has not been completed (items 1 & 2 above), it will be returned to the applicant with a letter of explanation.

Missing documents or an explanation of their absence will be requested of the applicant in writing.

Notes on all phone calls will be recorded on the WBE/MBE **file interview form**.

- (4) SBE application moves to (Item M) the certification step.

G. Second WBE/MBE File Review

When the file is determined to be complete, a second review will be conducted. During this review, the reviewer will make notes with particular attention to but not limited to:

- (1) The names, race and sex which appear in/on various documents:
 - (a) for conflicting information;
 - (b) determine the protected class owner's control.
- (2) Arrangements with non-protected class firms:

- (a) date interlocking directors and/or officers became involved;
 - (b) shared offices –date the arrangement became effective and terms of the arrangement;
 - (c) common telephone numbers – length of time been in existence and manner in which payment is handled;
 - (d) manner in which telephones are answered; and
 - (e) any other relevant information.
- (3) Review for compliance with certification requirements:
 - (a) perform item J
 - (b) perform item K
 - (c) perform item L

H. Additional Documentation or Information

Following the second file review, the reviewer may determine the need for clarification or additional information. Clarification or information may be requested by fax, phone or email.

I. After the second file review, the following actions may be implemented

- (1) A personal interview may be required of all firms seeking **certification** for the first time. The interview will be conducted at the applicant's place of business and/or job site with the majority owner of the firm. For out of state firms, the on-site will be requested from the home state.
- (2) If deemed appropriate, on-site visits to projects or to a firm's office within the state will be performed on firms seeking **continued participation (re-certification)** in the program.
- (3) New applicants should anticipate a processing time of approximately 30 days from the **date that all information has been submitted.**

J. Review of WBE/MBE Status

Applicant must certify that he/she is (WBE/MBE) a qualified person on page 3 of the WBE/MBE Certification Application form.

Persons who are in one of the below named minority groups are presumed to qualify for WBE/MBE certification:

- (1) Black Americans;
- (2) Hispanic Americans;
- (3) Asian Indians;
- (4) Native Americans;
- (5) Portuguese; and/or
- (6) Women

A person must be identified with and be commonly recognized as belonging to one of the identified groups shown on the previous page.

Individuals who do not belong to a presumptive group may be considered WBE/MBE if:

- (1) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially WBE/MBE.
- (2) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
- (3) Negative impact on entry into or advancement in the business world because of the disadvantage. VDMBE will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows WBE/MBE in entering into or advancing in the business world.
 - (a) Education. VDMBE will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.
 - (b) Employment. VDMBE will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.
 - (c) Business history. VDMBE will consider such factors as unequal access to credit or capital, acquisition of credit or capital under

commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

Applicants seeking certification are required to be U. S. Citizens or permanent residents.

K. Determination of WBE/MBE Ownership

1. The application will be carefully reviewed to determine:
 - if the protected class ownership is 51% or more;
 - if the protected class owners are making a substantial contribution in time, expertise, money, etc.
2. Each owner must provide some evidence of payment, monetary or in kind, for his or her share of ownership. Examples of evidence include cancelled checks, bookkeeping entries and/or signed agreements.
3. The following items (while not a conclusive list) may also be reviewed:
 - Stock Certificates (both sides)
 - Stock Transfer Ledger
 - Proof of Stock Purchase(s)
 - Shareholder Agreements (if any)
 - Partnership Agreements (if any)
 - Joint Venture Agreements (if any)
4. Office, equipment, telephone, and other resources shared with non-protected class firms will be reviewed.

L. Determination of WBE/MBE Control

The certification standards require the protected class owner to be in direct control of the day-to-day operations of the firm, as well as to have the power to make major decisions on management, policy, financial and operational matters. To make this determination, at a minimum, the following items will be reviewed for evidence of non-protected class control.

1. Any discrepancies or conflicts noted in the second file review will be explored further.
2. Articles of incorporation

- Date of incorporation;
 - Original officers and directors;
 - Description of articles.
3. Corporate By-Laws
- Duties of the directors and officers;
 - Voting rights of the stockholders;
 - Restrictive language which may affect the minority or woman's control
4. Shareholder Agreements
- The effect on the protected class owner's control if exercised.
5. Decision Making
- Individuals responsible for decision-making.
6. Resumes
- Education and work history of protected class member.
7. Individuals who have the authority to sign checks, invoices, lease or purchase agreements, etc.
- Number of signatures required on checks;
 - Signature authority; and/or
 - Dollar limitation on check signing
8. Does the protected class owner continue to work for a non-protected class firm?
- Describe the relationship of the firm to the applying WBE/MBE firm.
9. Who in the firm does the following?
- Negotiates contracts;
 - Negotiates loans;
 - Prepares estimates;
 - Makes financial decisions;
 - Hire and fire management personnel;
 - Is responsible for field supervision; an/or
 - Authorizes purchase of major equipment

Some of the questions in Sections K and L may be asked in either personal or telephone interviews if the answers cannot be determined through the documents that have been provided.

M. Certification

When all steps of the review process have been completed, a determination will be made to approve or deny certification.

(3) If the determination is to approve certification:

- a. A letter will be prepared; file will be given to Director or his/her designee, with reasons for granting certification documented, for his/her concurrence and approval.
- b. Steps will be taken to update database records accordingly:
 - A certification number will be obtained from the Scheduling & Contract Division and will be assigned to the firm;
 - The expiration date will be noted;
 - The firm's vital information will appear on the WBE/MBE Directory; and
 - A referral will be made to the Supportive Services Section for management/technical assistance.

(4) If the determination is to deny certification:

- (a) A letter will be drafted outlining the facts which led to the conclusion that certification should be denied and given to Director or his/her designee for concurrence and approval.
- (b) A representative of the Attorney General's Office may review the draft letter of denial, as determined by the Analyst.
- (c) The letter of denial will be sent by certified mail to the applying WBE/MBE with an invitation to make an appointment for an informal hearing to present additional information on mitigating facts.
- (d) Unless there is a request for a meeting within fifteen (15) days of the firm's receipt of our letter, a final denial letter will be sent by certified mail.
- (e) Should the firm choose to meet, the new evidence and the entire file will be reviewed following the meeting by members of the informal hearing committee. Such new evidence may be considered to clarify previously submitted information. However, changes to

information submitted prior to the initial denial will not be considered following final denial. The committee may be comprised of the Evaluating Analyst, Certification Supervisor, and a representative from the Attorney General's Office (if the applicant is represented by Legal Counsel). Other persons may be added to the committee. Normally, the firm will be notified within seven (7) days of the outcome.

- (f) A letter denying or granting certification will be mailed.
- (g) All denial letters will be sent by certified mail.
- (h) Any firm receiving a final denial of certification may appeal to the VDMBE in writing within 90 days of denial.
- (i) No firm and/or applicants affiliated with said firm(s) denied certification will be eligible to reapply for a period of one (1) year following the denial.
- (j) During reapplication, information and creditability of applicant during initial application will be considered along with any information made a part of the new application.

N. Continued participation (Recertification)

1. Notification

- (a) On a tri-annual basis, firms must apply for continued participation (re-certification) in the program to remain an eligible SWAM firm participant. All WBE/MBE firms applying for continued participation (re-certification) are eligible to use the Affidavit of No Change the 3rd year after certification unless there are changes in the ownership and/or control of the firm. If there have been changes, the firm will be required to submit a complete WBE/MBE Certification Application documenting changes and supporting documentation reflecting the changes. SBE firms are to use the SBE Certification/Re-certification Application.
- (b) In the WBE/MBE firm's year of certification expiration, it will be required to submit the Affidavit of No Change and current information for the firm and WBE/MBE owner(s).
- (c) In the SBE firm's year of certification expiration, it will be required to submit the SBE Certification/Re-certification Application.

- (d) The certified firm will receive a reminder and appropriate application form approximately 30 days prior to its anniversary date.
 - (e) All information for continued participation (re-certification), is requested to be received within 30 days after notification in a timely manner in order for the firm to continue in the program.
 - (f) If no response is received within the given timeframe, a final notice will be mailed. Failure to provide the information will result in the application being placed in inactive status and a new application may be required to continue processing.
 - (g) No firm that has failed to complete the above described certification process will appear on the certified list unless the Department has failed to process the application in a timely manner.
2. Following the review for continued participation, the firm will receive notification of continued participation.

O. Decertification – Grounds for and actions taken

- 1. The failure to provide information on any significant organizational change (such as change in ownership, officers, Board of Directors, etc.) within the firm to the Certification Officer within thirty (30) days after occurrence which may impact the firm's ability to remain a WBE/MBE;
- 2. Information that was not available to VDMBE at the time of the firm's certification;
- 3. Information that was concealed or evidence not available to VDMBE at the time the firm was certified;
- 4. Information that was concealed or misrepresented by the firm in previous certification actions by VDMBE, another state DOT, or US SBA;
- 5. A change in the certification policy or criteria and/or requirement of the Virginia Department of Minority Business since certification;
- 6. A documented finding that VDMBE's determination to certify the firm was factually erroneous;
- 7. As the result of information received from a third party or through a compliance review which questions the validity of a SBE/WBE/MBE's certification. Upon receipt of the compliant or review, VDMBE will

reopen the firm's file and may request additional information and/or perform on-site visits, interview employees, etc. and follow the routine procedures of the certification process.

If it is determined, based on VDMBE's review of any of the above stated reasons, that there is reasonable cause to believe that the firm is no longer eligible, the firm will be provided a written notice of removal of its eligibility. If it is determined, that the eligibility remains, the complainant and the firm will be notified in writing of that determination.

When a firm is notified that there is reasonable cause to remove its eligibility, VDMBE will give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. VDMBE's SBE/WBE/MBE Panel, senior staff whose primary duties does not involve certification reviews, will conduct the hearing.

NOTE: Nothing in this Evaluation Procedure shall take precedent over the Virginia Administrative Code, (Title 7, Agency 10, Chapter 20) with regards to MBE certification nor 49 CFR Part 26 with regards to the federal transportation related certifications.